Supreme Court, U.S.
FILED

041685 JUN 13 2005

OFFICE OF THE CLERK

Case No. 05-_____
SUPREME COURT OF THE UNITED STATES
October Term 2004

JANET DUVALL,

Petitioner,

vs.

SACRAMENTO SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS; CITY OF SACRAMENTO; H BOULT; JOHN DOE PERALTA; JANE DOE KEEFER GREEN,

Respondents.

Petition for Writ of Certiorari to the California Court of Appeal for the Third District

PETITION FOR WRIT OF CERTIORARI
With Appendix

JAMES JOSEPH LYNCH JR.
4144 WINDING WAY
SACRAMENTO, CA 95841-4413
(916) 485-8807
JJLYNCHJR@SBCGLOBAL.NET
WWW.JAMESJOSEPHLYNCHJR.COM

COUNSEL FOR PETITIONER

ISSUES PRESENTED

1. In view of *Patsy v. Florida Board Of Regents* (1982) 457 U.S. 496, and *University Of Tennessee v. Elliott* (1986) 478 U.S. 788, did the California court err in finding that Petitioner's 42 U.S.C., § 1983 claim was barred for failure to seek state judicial review of her available administrative procedures?

2. As to the City of Sacramento only, in view of *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 588, did the California Courts act in a purely arbitrary fashion, thereby denying Petitioner due process of law in dismissing an appeal for which notice was given subsequent to entry of the order, but prior to the entry of judgment pursuant to California Rules of Court, Rule 2(d),[1] which is analogous to Federal Rule of Appellate Procedure, Rule 4(a)(2)[2]?"

3. In view of *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *United States v. United States District Court*, 407 U.S. 297, 310 (1972) and *Graham v. Connor*, 490 U.S. 386 (1989), did the courts below err in using a "shocking of conscience" standard rather than a "reasonableness" standard on the 4th Amendment Claims in granting defendants' motions?

---

[1] "Rule 2(d) Premature notice of appeal

"(1) A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment.

"(2) The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment." See *Guest v. Sequoia Ventures, Inc* (2000) 83 cal. App. 4th 300, 303, construing former Rule 2(c), with a "good cause" requirement, which required "exercise of discretion".

[2] "(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry."

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To Chief Just and Associate Justice of Supreme Court Of The United States:

PETITIONER JANET DUVALL, petitions this court for review of a decision of the California Court of Appeals, Third District, as follows:

OPINIONS BELOW

There are no published opinions. The appeal of the judgment was dismissed due to an alleged failure of the appellate attorney to timely file a notice of appeal. The decisions and order for which review is sought of the Court of Appeal and Trial Court appear in the appendix to the Application of Petitioner in this court filed April 9, 2005, Duvall v. Sacramento Society, etc., 04A892, and in the appendix hereto, pp. A 1-12.

JURISDICTIONAL STATEMENT

Petitioner believes that 28 U.S.C. § 1254(1) and Supreme Court Rule 20 confer *jurisdiction* on this court because the petition seeks review within 90 days, extended by 30 (Application, 04-A892) of a denial of discretionary review by the highest state court having jurisdiction.

JURISDICTION OF TRIAL COURT/STATE COURT

The federal issues raised here were first raised in the state trial court the Complaint, and addressed by the trial court on a motion for judgment on the pleadings, Appendix, p. A4, and on Motions for Summary Judgment, Appendix, pp., 8, 9-12.

STATUTORY PROVISIONS INVOLVED

The following Statutes are involved:

4th Amendment, U.S. Constitution.

42 U.S.C., § 1983

California Penal Code, § 597.1

California Rules of Court, Rule 2(d).

Federal Rules of Appellate Procedure, Rule 4(a)(2)

STATEMENT OF THE CASE

A. PROCEDURAL POSTURE OF THE CASE.

The case was initially filed in the trial court on August 8, 2000, alleging a deprivation of property without due process, under 42 U.S.C., § 1983. A Second amended complaint was filed on July 12, 2002, without substantive effect on the issues raised herein.

On January 2, 2003, the Court granted CITY's Motion for judgment on the pleadings based on a failure to timely exhaust available state judicial review of an administrative decision regarding probable cause. Appendix, page A6.

On January 15, 2004, the Court granted SSPCA's motion for summary adjudication on its cross complaint. Supp. CT, p. 812:18.

On February 3, 2004, the court granted SSPCA's motion for summary judgment on the complaint (Appendix, p. A9) and entered a judgment. Appendix, page A8. The order specifically relied upon the Court's order granting City's Motion for Judgment on the Pleadings (Appendix, p. A10:3-5), and thus became a part of the judgment entered. Appendix, page 8.

On March 10, 2004, the Court entered an Order for Summary Judgment as to Gyan Kalwani.[3]

On April 2, 2004, within 60 days of the entry of judgment on 2/3/04, Appellant filed a Notice of Appeal as to the judgment and all orders then existing. III CT 793.

Thereafter, the City got around to causing the entry of a judgment on the January 2, ruling.

On November 18, 2004, on application of the City, without opinion, the Third District Court of Appeal dismissed City only from the appeal, and remanded. Appendix, page A4.

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[3] No review is sought of this purely state claim. Defendant Kunwar was discharged in Bankruptcy.

Petitioner sought, and was denied, a timely petition for rehearing, Appendix, page A3, and thereafter, on December 16, 2004, filed a petition for Review in the California Supreme Court.

The Petition for Review was denied on February 16, 2005. Appendix, page A2.

B. FACTUAL BACKGROUND

Petitioner was, at all times relevant, registered with the American Kennel Club as a Breeder. She was recognized as having produced an award winning line of a American Staffordshire Terriers (hereinafter, AmStaffs) Appendix, pp. A20-A24.

This case concerns whether the seizure of Petitioner's 22 American Kennel Club registered AmStaffs used for breeding was supported by probable cause. These particular Amstaffs represent an important gene pool for AmStaffs.

Respondents took a significant number of color pictures of the animals during the seizure.[4] None of the pictures supported the proposition that the animals had been abused, underfed, or were living in substandard conditions. The defendant, in their depositions, all testified that it was a joint City and SSPCA operation. The hearing officer found that the animals had not been abused, but there was probable cause for the seizure requiring Petitioner to pay some $30,000 to get her animals back. Criminal charges for abuse of the animals were subsequently dismissed for failure to prosecute.

Unable to come up with the money for that or administrative review, petitioner shopped around until she could get an attorney to assist her, and then timely filed her 42 U.S.C., § 1983 case in State Court under the one-year state tort statutes of limitations then applicable.

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[4] The trial court struck this evidence.

The case was dismissed for failure to exhaust available state judicial remedies, among other things. Appendix, page A4-A6.

SUMMARY OF REASONS FOR GRANTING CERTIORARI

1. In view of *Patsy v. Florida Board Of Regents* (1982) 457 U.S. 496, and *University Of Tennessee v. Elliott* (1986) 478 U.S. 788, the California did court err in finding that Petitioner's 42 U.S.C., § 1983 claim was barred for failure to seek state judicial review of her available administrative procedures raising an important issue of law going to respect for this court's precedent which the court ought review.

2. As to the City of Sacramento only, in view of *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 588, the California Courts acted in a purely arbitrary fashion, thereby denying Petitioner due process of law in dismissing an appeal for which notice was given subsequent to entry of the order, but prior to the entry of judgment pursuant to California Rules of Court, Rule 2(d),[5] which is analogous to Federal Rule of Appellate Procedure, Rule 4(a)(2),[6] presenting an important federal issue going to whether the exercise of discretion in the manner exercised had the potential for discriminating against federal civil rights litigation

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[5] "Rule 2(d) Premature notice of appeal

"(1) A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment.

"(2) The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment." See *Giest v. Sequoia Ventures, Inc* (2000) 83 cal. App. 4th 300, 303, construing former Rule 2(c), with a "good cause" requirement, which required "exercise of discretion".

[6] "(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry."

brought in state courts that ought to be reviewed at this time.

3. In view of *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *United States v. United States District Court*, 407 U.S. 297, 310 (1972) and *Graham v. Connor*, 490 U.S. 386 (1989), the courts below did err in using a "shocking of conscience" standard rather than a "reasonableness" standard on the 4th Amendment Claims in granting defendants' motions, raising an important federal question which this court ought to review at this time for uniformity of decision.

Conclusion. Based upon the foregoing, this court should grant the writ of certiorari, and reverse summarily and remand for further consideration, or set the matter for briefing and argument on the merits.

REASONS FOR GRANTING CERTIORARI

I.

THE COURTS BELOW ERRED WITH RESPECT TO STATE EXHAUSTION THEREBY RAISING AN IMPORTANT FEDERAL QUESTION WHICH THIS COURT OUGHT REVIEW AT THIS TIME

The court granted The City of Sacramento's motion for judgment on the pleading for failure to exhaust available state judicial review of an administrative proceeding. App. p. A16 (previous order), A6.

Beginning with *Martinez v. California*, 444 U.S. 277 (1980), this court held that state law does not define the contours of federal civil rights claims arising under 42 U.S.C., § 1983. In *Patsy v. Florida Board Of Regents* 457 U.S. 496, 500-516 (1982), this court "*Held:* exhaustion of state administrative remedies is not a prerequisite to an action under 1983."

In *University Of Tennessee v. Elliott* (1986) 478 U.S. 788, 7954-796, this court held, "Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims, and thus a

federal common-law rule of preclusion would not be appropriate. Pp. 795-796. Indeed, when contrasted with 42 U.S.C., § 1997e, where suits by prisoners are conditioned on exhausting availability of administrative remedies, it is abundantly clear that the requirement does not apply petition.

In view of the foregoing, it appears the California court erred in finding that Petitioner's 42 U.S.C., § 1983 claim was barred for failure to seek state judicial review of her available administrative procedures raising an important issue of law going to respect for this court's precedent which the court ought review to clarify the law, if it needs clarifying and to secure uniformity of decision.

II.

THE APPELLAT COURT'S DISMISSAL OF THE APPEAL AS TO THE CITY OF SACRAMENTO RAISES AN IMPORTANT FEDERAL QUESTION REGARDING THE ABILITY TO DISCRIMINATE AGAINST FEDERAL CIVIL RIGHTS CASES BROUGHT IN STATE COURTS WHICH THIS COURT OUGHT REVIEW AT THIS TIME

As to the City of Sacramento only, in view of *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 588, the California Courts acted in a purely arbitrary fashion, thereby denying Petitioner due process of law in dismissing an appeal for which notice was given subsequent to entry of the order, but prior to the entry of judgment pursuant to California Rules of Court, Rule 2(d),[7] which is analogous to Federal Rule of Appellate

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[7] "Rule 2(d) Premature notice of appeal

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"(2) The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment." See *Giest v. Sequoia Ventures, Inc* (2000) 83 cal. App. 4th

Procedure, Rule 4(a)(2),[8] presenting an important federal issue going to whether the exercise of discretion in the manner exercised had the potential for discriminating against federal civil rights litigation brought in state courts that ought to be reviewed at this time.

III.

THE TRIAL COURT'S USE OF A "SHOCKING OF THE CONSCIENCE" STANDARD RATHER THAN A "REASONBALENESS" STANDARD AS TO THE FOURTH AMENDMENT CLAIMS RAISES AND IMPORTANT FEDERAL QUESTION THIS COURT OUGHT TO REVIEW AT THIS TIME

The trial court held that the facts of this case "do not shock the conscience."[9] App., p. A7.

"The determination of this question requires the essential Fourth Amendment inquiry into the "reasonableness" of the search and seizure in question, and the way in which that "reasonableness" derives content and meaning [407 U.S. 297, 310] through reference to the warrant clause." *Coolidge v. New Hampshire*, 403 U.S. 443, 473-484 (1971)." *United States v. United States District Court*, 407 U.S. 297 (1972). In *Graham v. Connor*, 490 U.S. 386 (1989), this Court held that "The reasonableness of the force used in each case must be evaluated from the perspective of a reasonable officer at the scene. The test is an objective one, asking whether the officers' actions were objec-

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300, 303, construing former Rule 2(c), with a "good cause" requirement, which required "exercise of discretion".

[8] "(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry."

[9] The decision seems to be gratuitous. The court had already dismissed the federal claims for failure to exhaust state judicial remedies. The sole causes left were state claims. Hence the need to address the Fourth Amendment at all appeared to be moot.

tively reasonable in light of circumstances confronting them, without considering their intent or motivation. (*Id, citing Scott v. United States*, 436 U.S. 128, 137-39 (1978).

Given this Court's unwavering adherence to a "reasonableness" test for Fourth Amendment violations the trial court's decision there is lacking a "shocking to the conscience" violation appears to raise a genuine federal question which this court needs to address at this time to make clear the standard applicable.

CONCLUSION

WHEREFORE, petitioner prays that this honorable court grant the petition and reverse and remand per curiam, or set the matter for briefing and argument, then reverse and remand, and such other and further relief as this court deems just and proper under the circumstances.

DATED: 6/10/2005

RESPECTFULLY SUBMITTED,

JAMES JOSEPH LYNCH, JR
ATTORNEY AT LAW SBN 85805
4144 WINDING WAY, # 4
SACRAMENTO, CA 95841-4413
OFFICE: (916) 485-8807

COUNSEL FOR PETITIONER

APPENDIX

ORDER, 2/16/05, CALIFORNIA SUPREME COURT DENYING REVIEW A2

ORDER, 12/08/2004, THIRD DISTRICT COURT OF APPEAL DENYING REHEARING A3

ORDER, 11/18/04, GRANTING CITY MOTION TO DISMISS APPEAL A4

ORDER 1/2/03, CALIFORNIA SUPERIOR COURT, COUNTY OF SACRAMENTO GRANTING CITY MOTION FOR JUDGEMENT ON PLEADING A5

LETTER, 3/29/05, THIRD DISTRICT COURT OF APPEAL, READY FOR DECISION A11

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BLADE, BEST IN SHOW, 1990 ..... A20

MACK THE KNIFE OF ALMDEN, # 1, 1998 ... A21

ALMADEN STAFFS, 1993 ..... A22

SHOWSIGHT..... A23

TOP BREEDERS A24

Writ
Panel: Sims, APJ
Hull, J.
Butz, J. Court of Appeal, Third Appellate District - No. C046585

S130098

IN THE SUPREME COURT OF CALIFORNIA

En Bane

JANET DUVALL, Plaintiff, Cross-defendant and Appellant,

v.

SACRAMENTO SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS et al., Defendants, Cross-complainants and Respondents.

Petition for review DENIED.

SUPREME COURT
FILED
FEB 1 6 2005
Frederick K. Ohlrich
Clerk
DEPUTY

GEORGE
Chief Justice

RECEIVED
FEB 2 2 2005
Clerk, Court of Appeal
Third Appellate District

A3

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

JANET DUVALL,
Plaintiff, Cross-Defendant and Appellant,
v.
SACRAMENTO SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS et al,
Defendants, Cross-complainants, and Respondents.

FILED

DEC – 8 2004

COURT OF APPEAL – THIRD DISTRICT

DEENA C. FAWCETT

BY _____ Deputy

046585
Sacramento County
No. OOAS04344

BY THE COURT:

Appellant Janet Duvall's petition for rehearing filed herein on November 29, 2004, is denied.

Dated: December 8, 2004

SIMS, Acting P.J.

cc: **See** Mailing List

A4

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

JANET DUVALL,
Plaintiff, Cross-Defendant and Appellant,
v.
SACRAMENTO SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS et al,
Defendants, Cross-complainants, and Respondents.

FILED
DEC – 8 2004
COURT OF APPEAL – THIRD DISTRICT
DEENA C. FAWCETT
BY _____ Deputy

BY THE COURT:

Respondent City of Sacramento's motion to dismiss the appeal is granted. The appeal filed April 2, 2004, is dismissed only as to City of Sacramento. This partial dismissal does not affect the remainder of the appeal.

Dated: November 18, 2004

SIMS. Acting P.J.

cc; See Mailing List

SAMUEL L JACKSON, City Attorney (SBN 79081) PAUL A. GALE. Deputy City Attorney (SBN 172447) CITY OF SACRAMENTO 980 Ninth Street, 10th Floor Sacramento, CA 95814 Telephone: (916)264-5346 Facsimile: (916) 264-7455 Attorneys for Defendant CITY OF SACRAMENTO	FILED ENDORSED 2003 JAN –2 am 11: 19 SACRAMENTO COURTS DEPT # 54
SUPERIOR COURT OF CALIFORNIA COUNTY OF SACRAMENTO	
JANET DUVALL Plaintiff, v SACRAMENTO SOCIETY-TOR THE PREVENTION OF CRUELTY TO NIMALS, et al Defendants.	CASE NO. OOAS04344 ORDER GRANTING DE-FENDANT CITY OF SACRAMENTO'S MO-TION FOR JUDGMENT ON THE PLEAD-INGS(JOINDER BY SSPCA Date: December 13,2002 Time: 9:00 a.m. Dept: 54 Trial Date: none

Defendant CITY OF SACRAMENTO'S Motion for Judgment on the Readings (Joinder by SSPCA) came on regularly for hearing in Department 54 of the above-entitled court on December 13, 2002. The Court, having read and considered the moving and opposing papers, issued its tentative ruling on December 12,2002 as follows:

Plaintiff alleges the SSPCA seized her dogs and other personal property. Plaintiff requested the post-seizure hearing required by Penal Code section 597. The Hearing decision was rendered on October 19, 1999. A misdemeanor complaint was filed and a warrant issued on January 16,2000. On May 13, 2002, the court dismissed the criminal complaint or failure to diligently prosecute the case in violation of plaintiff's 6th amendment right Plaintiff does not allege that she at any time sought to overturn the Hearing decision by seeking a writ of mandate pursuant to C.C.P. § 1094.5. Plaintiff has alleged that as a result of defendants' actions, her dogs along with other personal property was lost and/or taken by defendants. The rulings below relate to plaintiff's Cause of action regarding her dogs, not her cause of action regarding her claims that her other personal property was taken, except where otherwise indicated. Defendants move for judgment on the pleadings (hereafter jop) on the ground plaintiff failed to exhaust her judicial remedies by not seeking to overturn the Hearing Officer's decision by writ of mandate

[04-A892, p. A4] 1

ORDER GRANTING DEFENDANT CITY OF SACRAMENTO'S MOTION FOR JUDGMENT ON THE PLEADINGS (JOINDER BY SSPCA)

pursuant to C.C.P, § 1094.5 and other grounds as stated below. Plaintiff argues that state courts cannot require exhaustion in 42 U.S.C. § 1983 cases. Although the general rule is that a party may bring an action under the federal Civil Rights Act without exhausting state administrative remedies, Patsy v Florida Board of Regents (1982) 457 U.S. 496, the argument is that plaintiff failed to seek judicial review of administrative action. The two doctrines are distinguishable. See Knickerbocker v City of Stockton (1988) 199 CA3d 235, Miller v County of Santa Cruz (9th Cir, 1994) 39 F.3d 1030. Briggs v City of Rolling Hills Estates (1995)

40 C.A.4th 637 held that failure to seek judicial review of administrative action bars a state action under the federal Civil Rights Act. Briggs, supra, at 646. Plaintiff argues she has a right to a judicial decision on the issue of abandonment. That is precisely the reason plaintiff should have sought judicial review of the decision by the Hearing Officer. Moreover, Penal Code § 597.1 allows for seizure under appropriate circumstances followed by a hearing. Plaintiff argues neither the SSPCA nor the City could enter her home without a warrant or probable cause. This is an issue that could and should have been addressed by seeking judicial review of the administrative decision. Plaintiff argument that P.C. § 597.1 provides its own procedural rules to the exclusion of § 1094.5 is rejected. Plaintiff argues that P.C; § 597.1 is unconstitutional on its face and as applied because the defendants and the hearing officer had financial interests in the outcome of the hearing, however that is not alleged in her complaint nor does plaintiff allege she made this argument during the post-seizure hearing, which means it is waived. Broden v Marin Humane Society (1999) 70 C.A. 4th 1212. Plaintiff's arguments regarding dog regulations and the City's acts being ultra vires should have been made by writ of mandate or should have been made at the post-seizure hearing. The motions for jop as to the first cause of action on the ground plaintiff cannot state a cause of action for violation of her Fifth Amendment rights is granted. Plaintiff has failed to allege facts regarding federal action or that any of defendants' actions can be claimed to be "federal." Furthermore, plaintiff cannot plead a Fifth Amendment violation based on conduct that is alleged as a Fourth Amendment unreasonable search violation. The facts alleged do not shock the conscience. Ayeni v Mottola (2d Cir. 1994) 35 F.3d 680. The motions for jop as to the first cause of action on the ground plaintiff cannot state a cause of action for violation of her Sixth Amendment rights are granted. The

allegations are that a misdemeanor complaint was filed against plaintiff, People v Duvall, which was dismissed by the court for failure to diligently prosecute the action. There are no allegations the City or any of the other defendants prosecuted the case. The motions for jop as to the second cause of action for conversion, the third cause of action for trespass to real property, the fifth cause of action for negligent infliction of emotional distress, the tenth cause of action for injunctive relief, are all sustained for failure to seek judicial review of the administrative action pursuant to C.C.P. § 1094.5. Furthermore, as to the fifth cause of action, plaintiff cannot seek emotional distress damages where the only alleged injury is to personal property, which encompasses both her cause of action for damages regarding dogs and her other personal property. Cooper v Superior Court (1984) 153 CA3d 1008. In their joinder, the joining parties submit that jop is also appropriate as to the fourth and sixth causes of action. No legal argument in support of this contention was made in either the joining papers or in the reply. Since the contention is not supported by a memorandum of points and authorities, it is denied. The motions for judgment on the pleadings are granted without leave to amend.

[04-A892, p. A5] 2

ORDER GRANTING DEFENDANT CITY OF SACRAMENTO'S MOTION FOR JUDGMENT ON THE PLEADINGS (JOINDER BY SSPCA)

After oral argument, the Court took the matter under submission and affirmed the tentative ruling with the following clarifications/modifications:

The first cause of action contains two claims; damages to plaintiff's dogs and dog/kennels/cages and damages to plaintiff's other personal property. Plaintiff argues that defendants' actions violated her fourth, fifth and sixth amendment rights.

The motions for jop as to the first cause of action regarding a 4th amendment violation is granted without leave to amend only as to plaintiffs claims regarding damages due to the taking of her dogs and dog kennels/cages. The motion is otherwise denied regarding damages due to taking of her other personal property.

The motions for jop as to the first cause of action regarding 5th and 6th amendment violations are granted without leave to amend as stated in the tentative ruling as to ail of plaintiff's claims in the first cause of action.

As a result of the rulings above, the first cause of action is limited to plaintiff's claim that defendants' seizure of her personal property, other than the dogs and dog kennels/cages, violated her fourth amendment right.

The motions for jop as to the third cause of action, trespass to real and personal property, is granted without leave to amend only insofar as plaintiff claims damages to her real property and personal property that relates to her dogs and dog kennels/cages. The motion is otherwise denied as to plaintiff's other personal property.

At oral argument, plaintiff argued this case is not about due process nor the seizure of plaintiff's dogs but rather is the seizure of plaintiff. The Court notes that the City did not move for jop as to the sixth cause of action, malicious prosecution, and it did not rule on the other defendants' purported joinder regarding the sixth cause of action. The sixth cause of action is therefore still at issue.

IT IS SO ORDERED.

DATED- JAN -2 2003

JOE S GRAY
JUDGE OF THE SUPERIOR COURT

JOE S GRAY

Approved as to form:

JAMES JOSEPH LYNCH, JR
Attorney for Plaintiff Janet Duvall

JAMES J. KEENAN, JR.
Attorney for Defendant Gyan Kalwani

SAMUEL E. MEREDITH
Attorney for Defendants SSPCA, Jane Peralta, Patricia Keefer-Green, and Henry Bernard Boult

RAM D. KUNWAR
In Pro Per

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ORDER GRANTING DEFENDANT CITY OF SACRAMENTO'S MOTION FOR JUDGMENT ON THE PLEADINGS (JOINDER BY SSPCA)

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DEPUTIES:
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SUSAN E. WELSH

March 29, 2005

The Law Office of James Joseph Lynch
2740 Howe Avenue
Sacramento, CA 95821-0336

The Law Office of Vogel & Meredith
Samuel E. Meredith
456 Montgomery Street, 20th Floor
San Francisco, CA 94104

The Law Office of Mark Goudy
1206 Q Street, Suite 1
Sacramento, CA 95814

The Law Office of James J. Keenan
901 H Street, Suite 610
Sacramento, CA 95814

Re: Duvall v. Society for Prevention of Cruelty etc. et al. C046585 Sacramento County No. OOAS04344

Dear Counsel:

The court is prepared to render a decision in the above case without hearing oral argument. Oral argument may be waived by failure to file a written request with proof of service on or before April 8, 2005. If no request is made, the case will be submitted for deci-

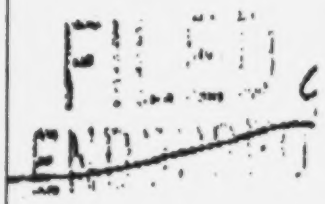
sion on written order upon approval of the waiver by the court

VERY TRULY YOURS,

DEENA C. FAWCETT
CLERK/ADMINISTRATOR

BY:
DEPUTY CLERK

[04-A892, p. A7]

SAMUEL E. MEREDITH, #042088 NICOLE L MEREDITH, #161721 VOGL& MEREDITH 456 Montgomery Street, 20th Floor San Francisco, CA 94104 Telephone: (415) 398-0200 Attorneys for Defendants SACRAMENTO SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, KATIE PERALTA (SUED HEREIN AS JANE DOE PERALTA), PATRICIA KJBEFER-GREEN and HENRY BERNARD BOULT		
SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF SACRAMENTO UNLIMITED JURISDICTION		
JANET DUVALL. vs. SACRAMENTO SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS Defendants		No. OOAS04344 JUDGMENT BY COURT UNDER C.C.P. § 437c ON CROSS-COMPLAINT FILED BY SACRAMENTO SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS Time: 9:00 a-m. Dept: 54 Trial Date: February 17,2004

This Court, having on January 15, 2004 granted the motion for summary judgment filed by Cross-Complaint Sacramento Society for the Prevention of Cruelty to Animals ("SSPCA") on its Cross-Complaint, and having thereafter entered an order granting said motion,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Cross-Complainant Sacramento Society for the Prevention of Cruelty to Animals is entitled to Judgment on its Cross-Complaint and shall recover from Cross-Defendant Janet Duvall the sum of$334,958.12, plus interest at the legal rate from the date Judgment is entered until said sum is satisfied.

Dated: Feb –3 2004

SHELLYANNE W.
JUDGE OF THE SUPERIOR

00781

Judgment By Court Under C.C.P. Section 437c

[04-A892, p. A8]

SAMUEL E. MEREDITH, #042088 NICOLE L MEREDITH, #161721 VOGL& MEREDITH 456 Montgomery Street, 20th Floor San Francisco, CA 94104 Telephone: (415) 398-0200 Attorneys for Defendants SACRAMENTO SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, KATIE PERALTA (SUED HEREIN AS JANE DOE PERALTA), PATRICIA KJBEFER-GREEN and HENRY BERNARD BOULT	FILED ENDORSED 2004 FEB -3 PM 1:42 SACRAMENTO COURTS DEPT. 54
SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF SACRAMENTO UNLIMITED JURISDICTION	
JANET DUVALL. Vs SACRAMENTO SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS Defendants	No. OOAS04344 ORDER GRANTING MOTION FOR SUMMARY ADJUDICATION IN PART, AND DENYING MOTION FOR SUMMARY JUDGMENT ON COMPLAINT Date: January 15,2004 (Cont from January 15, 2004 Time: 9:00 a-m. Dept: 54 Trial Date: February

	17,2004

The motion for summary judgment or alternatively, summary adjudication of issues filed by defendants Sacramento Society for the Prevention of Cruelty to Animals, Katie Peralta, Patricia Keefer-Green and Henry Bernard Boult (collectively "SPCA defendants") came on regularly for hearing on January 15, 2004, at 9:00 a.m. in Department 54 of the above-entitled Court, the Honorable Shelleyanne W.I. Chang, Presiding. James Joseph Lynch, Jr. appeared for plaintiff Janet Duvall. Nicole Meredith appeared for the SPCA defendants. After considering the papers and evidence filed, as well as argument of counsel, and GOOD CAUSE APPEARLN'G, the Court hereby adopts i1s tentative ruling issued January 14, 2004, set forth below and grants/denies the motion as follows:

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Order Granting Motion for Summary Adjudication, in Part, and Denying Motion for Summary Judgment on Complaint CT 000782

[04-A892, p. A9]

First cause of action for violation of civil rights (42 U.S.C. section 1983), second cause of action for conversation and third cause of action for trespass to real and personal property: Denied. By previous ruling of this Court on January 2, 2003, these causes of action are limited to plaintiff's personal property, excluding her dogs and dog-related items. In addition, only Plaintiffs Fourth Amendment claim remains in the first cause of action.

Defendants contend that plaintiff will never be able to prove up any claim for loss of other personal property against them, Defendants have produced evidence that plaintiff left the property early in the morning on September 30, 1999, and her houseguest left sometime later. Plaintiff did not have a key to the property and did not lock. the property. Defendants Peralta, Keefer-Green and Boult deny that they took possession of or removed any personal property other than the dogs and kennels/cages; Plaintiff docs not know who took her property, and has no information that anyone from the SPCA was responsible for hiding the items. Plaintiff made no report to the police. This evidence is sufficient to meet defendants' initial burden of showing that they did not take plaintiffs personal property, shining the burden to plaintiff to produce evidence raising a triable issue of material fact.

Plaintiff contends that she secured her properly by leaving one or more dogs on guard, and that the circumstantial evidence that defendants were present and had access to her property on the day it was allegedly taken is sufficient to show that they took her property. The inference from the undisputed fact that defendants were present and had access to plaintiff's personal property on the day is sufficient to create a triable issue of material fact.

Fourth cause of action for invasion of privacy: Granted. The second amended complaint alleges that defendants invaded plaintiffs light to privacy by advising television and news media that plaintiff was guilty of cruelty to animals and kept fighting Pit Bulls, which statements were untrue and damaged plaintiffs reputation in the dog showing and training communities. Defendants have produced evidence denying that they contacted the media concerning removal of the dogs, or that they made any of the statements alleged by plaintiff. Ms. Keefer-Green did state that the dogs may have been fighting since they had bite marks, but

plaintiff was not identified by name. This evidence is sufficient to meet defendants' initial burden, shifting the burden to

plaintiff to produce evidence creating a triable issue of material fact.

Although plaintiff disputes defendants' denials that they contacted the media or made any of the alleged statements, she has produced no affirmative evidence in support of her allegations. She points out that there is no dispute that the media were present, and suggests that no one other than defendants were in a position to inform the media of the raid. She also contends that defendants conveyed by their conduct their belief that plaintiff had abused her dogs. These arguments are not supported by any evidence that would allow the Court to draw an inference creating a triable issue of material fact as to whether defendants contacted the media or made the alleged statements.

(The Court notes that judgment on the pleadings was granted without leave to amend as to the fifth cause of action for negligent infliction of emotional distress in the January 2, 2003 order.)

Sixth cause of action for malicious criminal prosecution: Granted. Defendants contend that plaintiff cannot prevail or this cause of action, because the criminal prosecution was dismissed or a technicality (failure to prosecute) not indicating plaintiffs innocence, and that probable cause for the prosecution based on the Statement of Decision resulting from a post-seizure hearing pursuant to Penal Code section 597.1.Defendants have produced sufficient evidence to meet their initial burden, shifting the; burden to plaintiff to produce evidence creating a triable issue of material fact.

Plaintiff asserts the dismissal of the case indicates lack of merit, but does not address defendants' contention with respect to probable cause. Given the unrefuted findings of the hearing officer in the Statement of Decision, issued October 19, 1999, the Court finds that plaintiff has not met her burden of creating a triable issue of material fact as to probable cause for the criminal prosecution.

As defendants did not prevail on all causes of action, the motion for summary judgment is denied.

Defendants' objections to plaintiffs' evidence are sustained as to the photographs of the dogs, excerpts from Humane Society publication and Lynch declaration (Volume I of Exhibits).

Order Granting Motion for Summary Adjudication, in Part, and Denying Motion for Summary Judgment on Complaint CT 000784

BLADE

Ch. Blade's Blue Grass Of Almaden

Best In Show

November 1990

Wine Country Kennel Club

Judge: Thomas C. Conway

Owner/Breeder
Almaden Staff
Janet Duvall
Loomis, CA
(916) 652-6906

Handler
Wayne Nelson
(916) 726-6558

BEST AVAILABLE COPY

BISS CH MACK THE KNIFE OF ALMADEN CGC

MACK IS THE #1 AM-STAFF IN THE COUNTRY.
HE IS A ONCE-IN-A-LIFETIME DOG

OWNERS
BRIAN AND LYNNE FRANCIS
SKYLINE STAFFS
914-986-2633

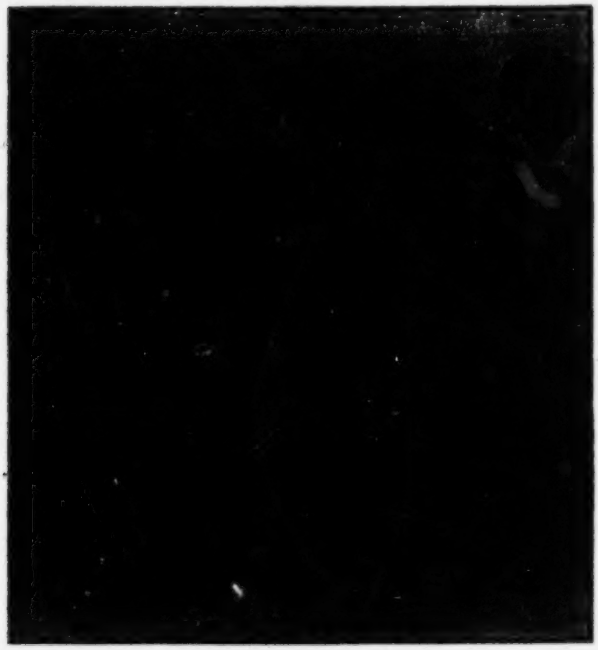
BEAUTIFULLY PRESENTED BY
PAT GRAHAM

BREEDER
JANET DEVALL

ALMADEN STAFFS

has won Best of Breed 3 out of 4 years Northern California Terrier Association

Spear

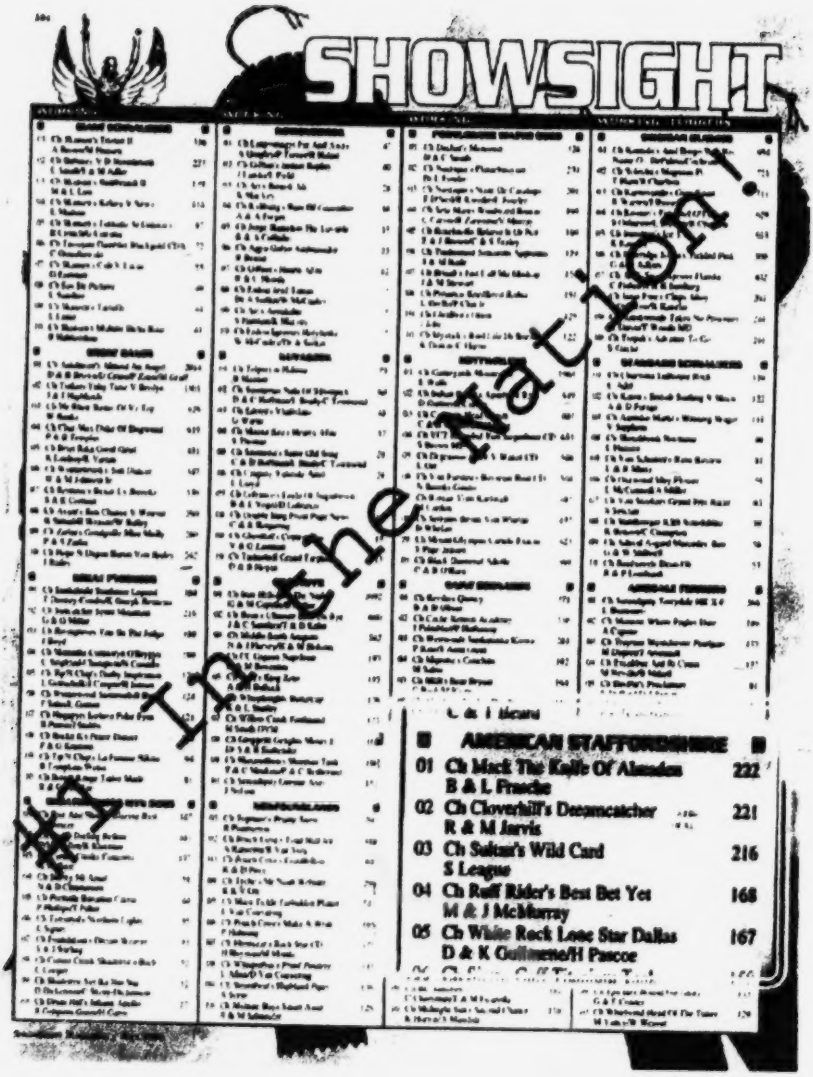


Int/Mex/Am Ch.
Spears Eagleview of Almaden CGC

BOB and multi Group placements, top sire and winner of the Stud Dog class BOB NCTA 1998.
Grandfather of "Mark" starring in Hollywood's feature movie, *"2 Days in the Valley."*

Watch for his pups in the ring

ALMADEN STAFFS • Janet Duvall
(408) 815-3147


SHOWSIGHT
AMERICAN STAFFORDSHIRE
01 Ch Mack The Knife Of Alasdon 222
B & L Proctor
02 Ch Cloverhill's Dreamcatcher 221
R & M Jarvis
03 Ch Sakan's Wild Card 216
S League
04 Ch Ruff Rider's Best Bet Yet 168
M & J McMurray
05 Ch White Rock Lone Star Dallas 167
D & K Gullimene/H Pascoe

Not in the Evolution!

TOP BREEDERS

FINALS FOR 1994. *American Staffordshire Terrier Breeders of 3 or more 1995 champions whose titles have been published in the March 1994 through April 1995 issues of "American Kennel Club Awards." Co-breeders are listed in parentheses after champion's name. Complied by Statistician, STA. 4401 Zephyr Street, Wheat Ridge, Colorado 80033.*

Number of breeders with same number of champions have the same rank), Breeder Name, Number of Champions, Champion Names (Co-breeders listed in parenthesis).

*****

Duvall, Janet – 5: My Lady's Baroness of Almaden, Kato's Blue Dragon of Almaden, High Sierra's Turbulence (Peter, Holly K), One Classy Lady of Almaden, spice Sweet Revenge of Almaden.

*****

Case No. 04-1685
SUPREME COURT OF THE UNITED STATES
October Term 2004

JANET DUVALL,

Petitioner,

vs.

SACRAMENTO SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS; CITY OF SACRAMENTO; H BOULT; JOHN DOE PERALTA; JANE DOE KEEFER GREEN,

Respondents.

Petition for Writ of Certiorari to the California Court of Appeal for the Third District

PETITION FOR REHEARING

JAMES JOSEPH LYNCH JR.
4144 WINDING WAY
SACRAMENTO, CA 95841-4413
(916) 485-8807
JJLYNCHSR@SBCGLOBAL.NET
WWW.JAMESJOSEPHLYNCHJR.COM

COUNSEL FOR PETITIONER

ISSUES PRESENTED

1. In view of *Patsy v. Florida Board Of Regents* (1982) 457 U.S. 496, and *University Of Tennessee v. Elliott* (1986) 478 U.S. 788, did the California court err in finding that Petitioner's 42 U.S.C., § 1983 claim was barred for failure to seek state judicial review of her available administrative procedures?

2. As to the City of Sacramento only, in view of *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 588, did the California Courts act in a purely arbitrary fashion, thereby denying Petitioner due process of law in dismissing an appeal for which notice was given subsequent to entry of the order, but prior to the entry of judgment pursuant to California Rules of Court, Rule 2(d),[1] which is analogous to Federal Rule of Appellate Procedure, Rule 4(a)(2)[2]?"

3. In view of *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *United States v. United States District Court*, 407 U.S. 297, 310 (1972) and *Graham v. Connor*, 490 U.S. 386 (1989), did the courts below err in using a "shocking of conscience" standard rather than a "reasonableness" standard on the 4th Amendment Claims in granting defendants' motions?

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[1] "Rule 2(d) Premature notice of appeal

"(1) A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment.

"(2) The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment." See *Giest v. Sequoia Ventures, Inc* (2000) 83 cal. App. 4th 300, 303, construing former Rule 2(c), with a "good cause" requirement, which required "exercise of discretion".

[2] "(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry."

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FRAP

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CALIFORNIA

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PETITIONER JANET DUVALL, respectfully moves this court for and order (1) vacating its denial of the petition for writ of certiorari, entered on November 3, 2005, (2) a temporary stay regarding a decision on whether to grant certiorari, and (3), in due course, granting the petition.

1. FACTUAL REASONS FOR GRANTING RELIEF

At the time of filing the petition, the case was final as to CITY only in the State Courts, and it was necessary to file to preserve the issue as to the City.

Petitioner in fact requested, and this court granted, an extension of time based on the Third District Court of Appeals letter claiming a decision would be forth coming.

The Third District Court of Appeal did not issue its decision until September 26, 2005, the same date this Court held it First Conference in this Case.

The Third District Court of Appeal affirmed its earlier decision that Petitioner had failed to exhaust State Administrative Remedies, and for that reason the 42 U.S.C., § 1983 claims were barred by the Doctrine of Collateral Estoppel.

A petition for rehearing has timely been filed, and the court must render its decision on or before No-October 26, 2005, or the petition is deemed denied.

If the Petition for rehearing is denied, a Petition for Review is due, and will be filed, no later than November 5, 2005. The California Supreme Court has until February 3, to decide whether to take the case for review.

The California Supreme Court has had two prior opportunities to review the decision below, and declined both times.

Should this court grant a temporary stay now, Petitioner can, and will, amend the original petition to show that the case is final as to all issues and as to all parties.

This Court then can proceed on its decision with respect to the petition based on the entire case.

2. EQUITABLE REASONS FOR GRANTING RELIEF

1. In view of *Patsy v. Florida Board Of Regents* (1982) 457 U.S. 496, and *University Of Tennessee v. Elliott* (1986) 478 U.S. 788, it appears that the California Courts did court err in finding that Petitioner's 42 U.S.C., § 1983 claim was barred for failure to seek state judicial review of her available administrative procedures raising an important issue of law going to respect for this court's precedent which the court ought review.

2. As to the City of Sacramento only, in view of *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 588, it appears that the California Courts acted in a purely arbitrary fashion, thereby denying Petitioner due process of law in dismissing an appeal for which notice was given subsequent to entry of the order, but prior to the entry of judgment pursuant to California Rules of Court, Rule 2(d),[3] which is analogous to Federal Rule of Appellate Procedure, Rule 4(a)(2),[4] presenting an important federal issue going to whether the exercise of discretion in the manner exercised had the potential for discriminating against fed-

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[3] "Rule 2(d) Premature notice of appeal

"(1) A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment.

"(2) The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment." See *Giest v. Sequoia Ventures, Inc* (2000) 83 cal. App. 4th 300, 303, construing former Rule 2(c), with a "good cause" requirement, which required "exercise of discretion".

[4] "(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry."

eral civil rights litigation brought in state courts that ought to be reviewed at this time.

3. In view of *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *United States v. United States District Court*, 407 U.S. 297, 310 (1972) and *Graham v. Connor*, 490 U.S. 386 (1989), the California courts below appear to have erred in using a "shocking of conscience" standard rather than a "reasonableness" standard on the 4th Amendment Claims in granting defendants' motions, raising an important federal question which this court ought to review at this time for uniformity of decision.

Based upon the foregoing, this Court should vacate its order denying certiorari, grant a stay to permit the case below to be completed and, and to permit petitioner to amend her petition for certiorari, then reconsider whether to grant the petition for writ of certiorari.

CONCLUSION

WHEREFORE, for the reasons set forth, as well as the those contained in petition for writ of certiorari, petitioner prays that this honorable court grant rehearing of the order of denial, vacate that order, stay further proceedings in this court pending a final resolution in the courts below, permit leave to amend the petition, then grant the petition and review the judgment and opinion below.

DATED: 10/27/2005

RESPECTFULLY SUBMITTED,

JAMES JOSEPH LYNCH, JR
ATTORNEY AT LAW SBN 85805
4144 WINDING WAY, # 4
SACRAMENTO, CA 95841-4413
OFFICE: (916) 485-8807

COUNSEL FOR PETITIONER

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

JAMES JOSEPH LYNCH, JR
ATTORNEY AT LAW SBN 85805
4144 WINDING WAY, # 4
SACRAMENTO, CA 95841-4413
OFFICE: (916) 485-8807

COUNSEL FOR PETITIONER